Supreme Court, U.S.
FILED
06-575 OCT 19 2006
OFFICE OF THE CLERK

No. (1)

In the
Supreme Court of the United States

WALID IHMOUD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eight Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT A. NOVELLE, SR.
Counsel of Record

TIMOTHY R. ROELLIG
On the Papers

SERPICO, NOVELLE,
PETROSINO & RASCIA, LTD.
61 West Superior Street
Chicago, Illinois 60610
(312) 787-1600

Attorneys for Petitioner

Midwest Law Printing Company/Photex — Chicago — (312) 431-0185

QUESTIONS PRESENTED

Whether the Fifth Amendment's protection against sentencing double jeopardy prohibits the defendant from receiving an additional twenty year sentence for a violation of 18 U.S.C. § 844 (b) where all of the elements of that offense are met by the combined elements of his other offenses of conviction.

Whether the offense of use of fire to commit another felony (mail fraud) under 18 U.S.C. § 844 (h), requires proof that a defendant knew that the fire at issue was intentionally set to obtain insurance proceeds, where Supreme Court precedent defe.ıse "use" to mean active employment during the commission of the underlying offense.

Whether the jury instruction for use of fire to commit another felony offense, under 18 U.S.C. § 844 (h), must specify the predicate felony, where the defendant is also charged with additional federal felonies that are prohibited from serving as predicate felonies.

TABLE OF CONTENTS

PAGE

Question Presented i

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional Provisions 2

Statement of the Case 3

Reasons for Granting the Writ 12

I. CERTIORARI IS WARRANTED WHERE THE DEFENDANT WAS SENTENCED TO AN ADDITIONAL SENTENCE FOR A VIOLATION OF 18 U.S.C. § 844(h) DESPITE THE FACT THAT ALL OF THE ELEMENTS OF THAT OFFENSE WERE MET BY THE COMBINED ELEMENTS OF HIS OTHER CHARGES 12

II. CERTIORARI IS WARRANTED WHERE THE COURT OF APPEALS INTERPRETED "USE OF FIRE" TO MEAN THAT A DEFENDANT WHO MAKES AN INSURANCE CLAIM ON AN INTENTIONALLY SET FIRE "USES FIRE" TO COMMIT MAIL FRAUD, EVEN IF THERE IS NO PROOF THAT THE DEFENDANT KNEW THAT THE FIRE WAS INTENTIONALLY SET TO

FRAUDULENTLY OBTAIN INSURANCE PROCEEDS, IN CONTRAVENTION OF SUPREME COURT PRECEDENT 17

III. CERTIORARI IS WARRANTED TO CLARIFY THAT A § 844 (h) JURY INSTRUCTION MUST SPECIFY THE PREDICATE FELONY TO AVOID THE POSSIBILITY THAT A DEFENDANT IS CONVICTED BASED ON AN IMPERMISSIBLE FELONY, PARTICULARLY WHERE THE DEFENDANT IS CHARGED WITH AN IMPERMISSIBLE PREDICATE FELONY 20

Conclusion 22

TABLE OF AUTHORITIES

Cases PAGE(S)

Bailey v. United States,
516 U.S. 137, 116 S.Ct. 501 (1995) 17, 18, 19

Garrett v. United States,
471 U.S. 773, 105 S. Ct. 2407 (1985) 13

Jones v. United States,
529 U.S. 848 (2000) 19

Missouri v. Hunter,
459 U.S. 359, 103 S. Ct. 673 (1983) 13, 14

Smith v. United States,
508 U.S. 223, 113 S.Ct. 2050 (1993) 18

United States v. Allen,
247 F.3d 741 (8th Cir. 2001) 13

United States v. Beltz,
385 F.3d 1158 (8th Cir. 2005) 13

United States v. Blockburger,
284 U.S. 299, 52 S. Ct. 180 (1932) 13, 14, 15, 16

United States v. Chaney,
559 F.2d 1094 (7th Cir. 1977) 21

United States v. Corona,
108 F.3d 565 (5th Cir. 1997) 14, 21

United States v. Fiore,
821 F.2d 127 (2nd Cir. 1987) 14

United States v. Gardner,
211 F.3d 1049 (7th Cir. 2000) 14, 21

United States v. Handford,
39 F.3d 731 (7th Cir. 1994) 13

United States v. Karlic,
997 F.2d 564 (9th Cir. 1993) 14, 21

United States v. Konopka,
409 F.3d 837(7th Cir. 2005) 21

United States v. Nguyen,
28 F.3d 477 (5th Cir. 1994) 14

United States v. Patel,
370 F.3d 108 (1st Cir. 2004) 14, 15, 16, 21

United States v. Rivera Martinez,
931 F.2d 148 (1st Cir. 1991) 13

United States v. Ruiz,
105 F.3d 1492 (1st Cir. 1997) 18

United States v. Smith,
354 F.3d 390 (5th Cir. 2003) 14

United States v. Zendeli,
180 F.3d 879 (7th Cir. 1997) 14

Federal Statutes

18 U.S.C. § 844 (h) ..... *passim*

18 U.S.C. § 924(c) 18

OPINION BELOW

The judgment of the United States District Court of the Eastern District of Missouri is unreported. (App. 1) The Eighth Circuit July 21, 2006 decision affirming the defendants conviction and sentence is reported at 454 F. 3d 887. (App. 22 et seq.)

JURISDICTION

This is a direct appeal from the judgment and the sentence of the United States District Court for the Eastern District of Missouri, Eastern Division, the Honorable E. Stephen N. Limbaugh, presiding, entered on July 28, 2005. Notice of appeal was filed on July 28, 2005.

The district court had jurisdiction pursuant to 28 U.S.C. § 3231, which provides exclusive jurisdiction of offenses against the United States. The jurisdiction of the district court was invoked by the United States Attorney for the Eastern District of Missouri under the criminal laws of the United States by charging the Defendant with violations of Title 18 U.S.C. § 371, § 1321, and § 844.

Jurisdiction was conferred on the United States Court of Appeals for the Eighth Circuit by 28 U.S.C. § 1291, 18 U.S.C. § 3742 and Federal Rule of Appellate Procedure 4(b). The District Court for the Eastern District of Missouri is located within the jurisdiction of the United States Court of Appeals for the Eighth Circuit. 28 U.S.C. § 41.

The judgment of the Eighth Circuit Court of Appeals was entered on July 21, 2006. (App. 22 et seq.) Petitioner did not file a petition for re-hearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Art. V.,

No person shall be **** subject for the same offense to be twice put in jeopardy of life or limb ***.

18 U.S.C. § 844 (h), Penalties

(h) Whoever -

(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

(2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States,

including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 20 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried.

STATEMENT OF THE CASE

Mr. Ihmoud (a.k.a. "Wally") was charged and convicted with the crimes of Conspiracy to Commit Arson, in violation of 18 U.S.C. § 2 and 371, regarding all charged arsons; three counts of Arson, in violation of 18 U.S.C. § 844(i), regarding a fire on August 20, 2002, another on June 8, 2003, and another on July 10, 2003; three counts of Mail Fraud, in violation of 18 U.S.C. § 1341, based on insurance claims made concerning the above referenced fires; and two counts of Arson in Furtherance of Mail Fraud, in violation of 18 U.S.C. § 844(h)(1), for the August 20, 2002 fire and the July 10, 2003 fire. The offenses arose from conduct alleged to have occurred from on or about August of 2002 to August 12, 2004. Mr. Ihmoud was indicted with Zeyad Abdeljabbar (a.k.a "Steve"), Mohammad Almassri (a.k.a. "Mike"), Said Jarabaa (a.k.a. "Sammy"), and Charles D'Ary (a.k.a. "Chuck").

The District Court, The Honorable Stephen N. Limbaugh, presided over the jury trial of all five defendants, which commenced on April 18, 2005 and concluded with verdicts of guilty on May 4, 2005. The district court sentenced Mr. Ihmoud on July 28, 2005, to a sentence of 457 months of imprisonment.

A. STATEMENT OF FACTS

A jury convicted Mr. Walid Ihmoud, a business owner in St. Louis, of joining an agreement to burn his business, as well as the business of his partner, Steve Abdeljabbar. Out of this alleged scheme, the Government carved nine offenses, and the jury convicted on all nine.

Quality Bargain Fire - August 20, 2002

Walid Ihmoud owned Quality Bargains, Inc., operating in the plaza located at 8350 North Broadway, in St. Louis. Mr. Ihmoud purchased $302,500.00 in business contents insurance for Quality Bargains through Essex Insurance Company. On August 20, 2002, an intentionally set fire damaged the store. Both the St. Louis Police and Fire Departments investigated the fire, finding that the fire began in the back of the store, in an area containing carpets and rugs, with no proof of forced entry or accelerants. Following the fire, Mr. Ihmoud reported and mailed a Property Loss Notice to Essex Insurance claiming $300,000.00 in damages and losses as a result of the fire. Essex made an insurance payment of $300,010.00 to Quality Bargains, the adjustor and Allegiant Bank.

The alleged scheme to burn various stores

In October of 2002, Mr. Ihmoud, along with Mr. Abdeljabbar and Abdelhalleem Abdeljabbar, incorporated St. Louis Supermarket # 4, Inc.. Quality Bargains essentially merged with St. Louis Supermarket #4 at its 8350 North Broadway location and began operating in November of 2002. On November 21, 2002, Mr. Ihmoud purchased $2,200,000.00 in insurance coverage for the business contents and income for the store through Evanston Insurance Company.

Eldgre Huddleston, James Huddleston, William Huddleston, all brothers, testified pursuant to an immunity agreement. Their nephew, David Orr, also testified pursuant to an immunity agreement. All were employees, of one sort or another, of Abdeljabbar and Ihmoud.

Eldgre claimed that in the spring of 2003 Steve asked him to burn the four supermarkets. Steve offered to pay Eldgre a years worth of salary, or about $30,000 in cash.

Steve told him that he wanted smoke damage at the Magnolia and Grand store, so he could re-open in a couple days. Abdeljabbar told him he wanted it done before July 4, 2005, but did not tell him why. Eldgre recruited his nephew Denis Orr to help. Eldgre was approached by Mike Almassari, a store employee, and Mike told him what had to be done in regards to the burning of the stores.

Eldgre testified to various acts he, Dennis Orr, and Mike Almassari took in their unsuccessful attempt to burn 8350 South Broadway, including planning the fire, the use of gas in jugs, and chopping holes in the ceiling to help the fire burn.

Eldgre claimed he wasn't involved in the planning or burning of the Natural Bridge store. Eldgre was "vaguely" involved in the planning to burn the store on South Grand and the store on Frost. Eldgre testified that Jose Rodriguez, an employee of the stores, asked Eldgre about an opportunity Steve had presented him with, asking Jose to burn a store. Eldgre told Jose that if he wanted to do it that he should go ahead and do it.

James Huddleston testified that in May of 2003, at Steve's request, he had a meeting with Steve, Chuck, Mike, and Wally where they went over the burning of the four stores. James had been working at the store for a month at this time. Steve, according to James, told him that he wanted to burn all four stores before July 4th because the stores weren't making any money. Steve also told him that Chuck and Mike were going to help him burn the store. James claimed that Steve instructed that he wanted all the stores burned at one time; that he wanted him to use gas; and he wanted him to make it appear as though someone lit the fires because they did not like Iranians. Steve told James, at a later time, that he wanted the stores burned down by July 1st.

James claimed that Chuck D'Ary told him he wanted the Broadway stores and the other stores to burn like Chuck had burned Quality Bargains. James claimed, without attributing the source of this information, that Wally would be the person he should go to if he needed anything or needed further directions in relation to burning the stores. James stated he was going to be paid for his work.

Concerning the June 8, 2003 fire at Broadway, James testified that did not plan it. Chuck told James that he had made the fire look like an electrical fire but that he was disappointed because it did not ignite. James also claimed to have had a conversation with Chuck and Wally on separate occasions about the fact that the soot damage to the grocery aisle was not sufficient to allow for an insurance claim. James also asserted that Wally told him, Mike and Chuck to take merchandise from the floor and from the store room, break it up and strew it along the area of the fire so that it would appear that it was broken by the fireman and they could get insurance money for it. James claimed that after the June 8th fire, Wally told him that there was an electrical bill outstanding from the prior owners of the store. Wally told him that he would not open the business on Monday if the fire did not happen.

James also testified about the July 3, 2003 incident at Broadway. James testified that on July 2nd he loaded some materials from the Broadway store into Chuck's van, where he saw Chuck take two red gas cans from his van. Chuck told him that they were for the pressure washer on the roof. James testified that he told Wally about the gas, and that Wally said nothing in response to his comment.

On July 2, 2003, James stated that he left the store at closing time with Walid, Walid's wife and Chuck. James claimed that as they were leaving, Chuck told Wally that that was the night he was going to burn the store. James stated that Walid did not respond to the information.

When he got back, Wally instructed him to call 911 because someone had found gasoline on the roof, the same gas cans, James claimed, that Chuck had taken out of his van.

James stated that Wally told him that he had not called the police, and then that he had called the police but they said that they would take a report about it over the phone. James claimed that he told Wally that he would call the police and he did. After the police had left, James had a conversation with Chuck and Walid where Walid told him "he had messed up." He stated that he also overheard Chuck state, and Wally agree, that he needed to get the gas cans off the roof.

June 8, 2003 St. Louis Supermarket Fire

On June 8, 2003, St. Louis Supermarket # 4, North Broadway had a fire. Initial investigation by the St. Louis Fire Department determined the fire was accidental, caused by an electrical short. The Government produced evidence, through detectives in the St. Louis Police Department Arson and Bomb, that the fire was intentionally set. On December 9, 2003, Mr. Ihmoud mailed a proof of loss claim bearing his signature for $1,205,000.00 in damages and losses as a result of the June 8, 2003 fire. Evanston never paid on the claim.

St. Louis Supermarket North Broadway - July 3, 2003

On July 3, 2003 law enforcement officials arrived at 8350 North Broadway to find 15 holes ripped into the roof above the St. Louis Supermarket. Gasoline, in juice containers and conventional gas cans, was also found on the roof. A maintenance man for the buildings owner, Burt Schonlau,

had discovered the condition of the roof during a maintenance check. The maintenance man found the indoor roof hatch was open. Once up on the roof, the maintenance man also found juice containers and five gallon containers with gas on the roof. He thought this odd because although gas is kept on the roof for cleaning, it had been removed a few days before for another job. A chemical analysis, stipulated to by the defense, was positive for gasoline.

Burt Schonlau, the building owner, arrived and went up to the roof. About one half hour had elapsed and the police had not been called. Mr. Ihmoud told James Huddleston that he had called the police, and they were going to take a report over the phone. James, told Mr. Ihmoud that due to the condition of the roof and the presence of the gas, the police wouldn't take a report like that over the phone. James then called the police. Chuck D'Ary was identified by the maintenance man as being at the store at that time, and that Chuck told him something to the effect of "knowing who's fingerprints was on that gasoline on the roof"and moved the gasoline to help or protect those "guys."

St. Louis Supermarket North Broadway - July 10, 2003 Fire

On July 10, 2003, the St. Louis Supermarket at North Broadway burned. St. Louis Police Department Bomb and Arson Unit investigators determined that the fire was intentionally set. Investigator Putman, the cause and origin investigator, believed that the fire was started by an open flame, without an accelerant. The investigation revealed that the store had a video surveillance system. Mr. Ihmoud freely gave the recording equipment to the police.

The surveillance equipment recorded the interior of the Broadway store on July 10, 2003. It recorded Walid

Ihmoud's presence in the store near the customer service area. Chuck D'Ary is seen, at 8:51 p.m. walking toward the back of the store. D'Ary is then seen moving back and forth in a crouched or bent position for approximately 10 minutes in the back of the store. The recordings show that, at about 9:03 p.m., Walid Ihmoud and Charles D'Ary locked the store and set the burglar alarm for the night. No one else is recorded as being in the store for the next two and a half hours. The recording then shows smoke rising in the back area of the store. The recordings also showed Mr. Ihmoud's wife, his daughter, and at least two employees present near closing time. The recordings showed customers and other employees going back to the southeast corner of the store, the area where the fire started, prior to closing. On December 12, 2003, Mr. Ihmoud signed and mailed a Proof of Loss claim to Evanston Insurance, claiming $250,000.00 in damages and losses as a result of the fire. The claim was never paid.

St. Louis Supermarket 2700 South Grand—July 21, 2003

The St. Louis Supermarket at 2700 South Grand had $5.6 million in insurance coverage from Safeco Insurance Company for the store and property (along with coverage for Broadway Real Estate Investment's interest at 8350 North Broadway obtained by Abdeljabbar as of July 21, 2003). At 12:00 a.m. on July 21, 2003, Jose Rodriguez and Gonzalo Rosilles went to St. Louis Supermarket, at 2700 South Grand, with a plan to burn the store. Rodriguez testified that Steve hired him to do the job, but that he backed out at the last minute. The 2700 South Grand location did not burn.

St. Louis Supermarket Natural Bridge - July 21, 2003

On July 21, 2003, the Natural Bridge location of St. Louis Supermarket, owned by Steve Abdeljabbar and Basam Hamed burned as a result of an intentionally set fire. Abdeljabbar had several over-lapping insurance policies on the property and contents of the store. Surveillance video recorded someone starting the fires by throwing lighted wicks on areas doused with gasoline in the early morning hours of July 21, 2003, with no evidence of forced entry. On or about April 19, 2004, Basam Hamed mailed a Proof of Loss insurance claim to State Auto for the loss and damage to the store's contents claiming losses of $544,912.72 State Auto paid a $50,000.00 advance on the claim, to Hamed, but paid nothing further on the claim.

Adbeljabbar and Hamed made another claim to General Casualty as a result of the fire, claiming $756,099.54 in losses from the fire at Natural Bridge. On October 30, 2003, Abdeljabbar signed and mailed two Proof of Loss claims to State Auto claiming $354,055.08 and $184,448.01 in losses as a result of the July 21, 2003 fire. Although charged in the conspiracy count with this fire, Mr. Ihmoud was not directly implicated in the fire.

St. Louis Supermarket Frost—July 21, 2003

Abdeljabbar and Bassad Hassam owned another St. Louis Supermarket at 8352 Frost Ave., in Berkley, Missouri. In March of 2003, Abdeljabbar obtained $960,000.00 in insurance coverage for the store from State Auto. At about 3:00 a.m. on July 21, 2003, St. Louis Supermarket Frost, burned as a result of an intentionally set fire. Video tape surveillance, recorded at least two individuals starting fires by throwing bottles filled with gasoline over

the stores. On April 19, 2004, Abdeljabbar made a claim of $337,399.08 from the fire. No payments were made. Although charged in the conspiracy count with this fire, Mr. Ihmoud was not directly implicated in the fire.

Mr. Ihmoud's financial situation

St. Louis Police Department Detective Halveland testified concerning Mr. Ihmoud's income, based on his tax forms. For Walid Ihmoud, the income for 1999 was $25,497.00. For 2000, it was $36,996.00. For 2001, it was $46,346.00. For 2002 it was $31,540.00. The 2003 tax year showed a business loss of $274,810.00. The refund amount for that year showed a refund of $11,158.00. The W-2 form for Walid Ihmoud for 2003 showed an income from St. Louis Supermarket Number 4 of $43,125.00. The wages of Mr. Ihmoud for 2003 were a total of $60,750.00, for both the defendant and his wife.

Mr. Ihmoud's 2003 Quality Bargain taxes showed a gross income of $282,641.00 minus cost of goods of $160,000.00. After subtracting other expenses and costs he showed a profit of $50,989.00. Burt Schonlau, the landlord at the Broadway location, testified that any dispute over a large electricity bill was with Sterling Moody, the store's prior owner, and not Mr. Ihmoud. Schonlau did testify that in July, 2003, Mr. Ihmoud and Mr. Adbeljabbar did not pay their store rent.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED WHERE THE DEFENDANT WAS SENTENCED TO AN ADDITIONAL SENTENCE FOR A VIOLATION OF 18 U.S.C. § 844(h) DESPITE THE FACT THAT ALL OF THE ELEMENTS OF THAT OFFENSE WERE MET BY THE COMBINED ELEMENTS OF HIS OTHER CHARGES.

This Court should grant Certiorari to endorse the combination approach to sentencing double jeopardy analysis. Creative charging (or over charging) of complex and interrelated criminal statutes can result in an essential violation of sentencing double jeopardy principles. The combination approach to sentencing double jeopardy would serve important policy considerations. Fundamentally, it would recognize that creative charging, particularly where there are so called "stacked" punishments, must be rationally limited by the active offense conduct.

The Eighth Circuit's Opinion does not consider the combination approach; it merely holds that no double jeopardy violation occurs when a person is convicted of a conspiracy count and a substantive overt act of the conspiracy. (App. 36) The Eighth Circuit's reasoning is overly simplistic.

Mr. Ihmoud's sentence violates Double Jeopardy. The jury's finding that he committed the overarching conspiracy (Ct. 1); the August 20, 2002 arson (Ct. II) and the mail fraud count for that same arson (Ct. III), met all of the element requirements for "use" of a fire "to commit" the mail fraud. The same is true for count XVII, the arson in furtherance of mail fraud concerning the July 10, 2003 fire. All of the elements of use of fire to commit mail fraud are met by the convictions for the conspiracy, (Ct. 1), arson (Ct. VII) and mail fraud (Ct. VIII). This is the "combination" approach to the double jeopardy analysis. Mr.

Ihmoud's trial counsel did not object to the sentence on double jeopardy grounds, triggering plain error review.

The Double Jeopardy Clause, U.S.C.S. Const. Amend. 5, protects against multiple punishments for the same offense. See *United States v. Rivera Martinez*, 931 F.2d 148, 152 (1st Cir. 1991). The Clause, however, "does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 365, 74 L. Ed. 2d 535, 103 S. Ct. 673 (1983). The legislative intent limit on multiple punishment claims comes from Double Jeopardy Clause's "principle that the power to define criminal offenses and prescribe punishments . . . belongs solely to the legislature." *United States v. Handford*, 39 F.3d 731, 735 (7th Cir. 1994). If the legislature imposes multiple punishments for the same offense, there is no double jeopardy violation. See *Garrett v. United States*, 471 U.S. 773, 779, 85 L. Ed. 2d 764, 105 S. Ct. 2407 (1985).

The Eighth Circuit, agreeing with its sister circuits, has held that whether the legislature intended to impose multiple punishments is first discerned by looking to the statute itself. *United States v. Beltz*, 385 F. 3d 1158, 1161-62 (8th Cir. 2005); *United States v. Allen*, 247 F. 3d 741, 767-70 (8th Cir. 2001). The *Blockburger* test is employed to determine whether the legislature intended to authorize multiple punishments when the intent of congress is not clear. See *United States v. Blockburger*, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932). Under *Blockburger*, "where the same act or transaction constitutes a violation of two (or more) distinct statutory provisions, the test to be applied to determine whether there are two (or more) offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Blockburger*, 284 U.S. at 304. The *Blockburger* test is a stand in rule of statutory construction and only applied

when the statute and its intent are ambiguous. See *Hunter*, 459 U.S. at 367.

Under the *Blockburger* test Mr. Ihmoud's sentence does not pass muster. When the elements of conspiracy, arson and mail fraud are combined and compared to the elements of using fire to commit mail fraud, *Blockburger's* separate offense test is not met because every element of conspiracy, arson and mail fraud, are covered by the elements of using fire to commit mail fraud. The First Circuit has analyzed the statutory language of § 844 (h)(1) and has asked if "there are indications that congress intended, via § 844 (h)(1), to add a ten-year sentence where someone has been convicted of arson and convicted of a different felony that forms the basis of the § 844 (h)(1) convictions." *United States v. Patel*, 370 F. 3d 108, 118 (1st Cir. 2004) (Lynch, J. concur.) The *Patel* Court concluded that "[n]either the text nor the legislative history of the using fire statute reveals whether Congress intended to apply where the defendant is also charged with arson." *Patel*, 370 F.3d at 115-116. The *Patel* court found, using the *Blockburger* different elements test, that arson and using fire to commit mail fraud have different elements and thus survive *Blockburger* scrutiny. *Patel*, 370 F. 3d at 116, citing see *United States v. Smith*, 354 F. 3d 390, 399 (5th Cir. 2003), *United States v. Gardner*, 211 F. 3d 1049, 1056-57 (7th Cir. 2000); *United States v. Zendeli*, 180 F. 3d 879, 886 (7th Cir. 1997); *United States v. Nguyen*, 28 F.3d 477, 485 (5th Cir. 1994); *United States v. Karlic*, 997 F.2d 564, 571 (9th Cir. 1993); *United States v. Fiore*, 821 F. 2d 127, 130-31 (2d Cir. 1987).

The *Patel* Court recognized the possibility, relying on language in *United States v. Corona*, 108 F.3d 565, 573-75 (5th Cir. 1997), that "where there are more than two statutory provisions at issue, each offense must contain an element not contained *in the sum* of the elements of the other offenses." *Patel*, 370 F. 3d at 117, citing *Corona*, 108

F.3d at 572 (emphasis added). The *Patel* Court called this approach an "interesting and novel argument that the using fire conviction is duplicative. In essence, he [Patel] claims that combining the elements of mail fraud and arson satisfies all of the elements of the using fire offense." (Id. at 117).

The *Patel* majority, although rejecting the "combination" approach to *Blockburger,* noted that arson and mail fraud, when combined and compared to the 844 (h) offense, the § 844(h) had an element that the two combined offenses did not: the use of the fire to commit the arson. *Patel,* 370 F.3d at 117. The *Patel* court recognized that because the offenses arose out of one course of conduct, the facts necessary to establish each offense were the same. (Id.) *Blockburger,* the *Patel* court reasoned, is normally applied to elements, and not to the facts of each case. (Id.) The *Patel* Court, sympathetic to the theory, rejected its application under plain error, as it was not "clear" or "obvious" but rather emergent law. (Id.)

The *Patel* concurrence added some nuance to this analysis. While granting that technically, a comparison of the arson/mail fraud offense to the using fire offense produces an element not present in the arson/mail fraud, "common sense suggests that once the Government proved the elements of the arson charge (using fire to burden down a building) and the elements of the mail fraud charge (which in this case involved an insurance fraud scheme tied to the very fire in the very building involved in the arson charge), the connections between the two charges was already made and thus all of the elements of the § 844 (h)(1) offenses were already proven." *Patel,* 370 F. 3d at 119 (Lynch, J., Concur.)

In this case, the combination analysis is more persuasive. The element "use of fire to commit mail fraud" has the same factual underpinnings as the arson and mail

fraud counts. In addition, there is the conspiracy count, a count where the Government charged the defendants with the overt acts of using the fire to accomplish the insurance fraud. But if the arson and mail fraud offenses are combined with the conspiracy count and compared to the use of fire to commit mail fraud counts, it is clear that "the connection between the two charges was already made." Through the conspiracy count, the Government charged, as overt acts in the Superseding Indictment's subsection D, the following: (1) the August 20, 2002 fire, done at the request of Mr. Ihmoud; (2) the making of the insurance claim based on that fire and; (3) the July 10, 2003 fire, done at the request of Mr. Ihmoud, (4) and the making of the insurance claim based on that fire. (App. 44-46) Thus, the "use" of fire "to commit" the fraud was included in the conspiracy charges, and as evidence of the overt act element.

The *Patel* court's concern that the "use of fire to commit" the felony was an element not contained in the arson or mail fraud counts does not exist here. The *Patel* Court was also concerned that the traditional *Blockburger* test cannot account for the complexity inherent in combined offenses and predicate felonies, and therefore is not a reliable indicator of congressional intent. Here, the combined elements, particularly when read in conjunction with the overt acts, clearly demonstrates that the arson, mail fraud, and conspiracy counts provide all the elements of the § 844 (h) counts. Additional punishment on the § 844 (h) counts therefore violates double jeopardy. This Court should grant certiorari to endorse the combination approach, and thereby insure that sentencing double jeopardy has constitutional vitality in the context of complex federal charging.

II. CERTIORARI IS WARRANTED WHERE THE COURT OF APPEALS INTERPRETED "USE OF FIRE" TO MEAN THAT A DEFENDANT WHO MAKES AN INSURANCE CLAIM ON AN INTENTIONALLY SET FIRE "USES FIRE" TO COMMIT MAIL FRAUD, EVEN IF THERE IS NO PROOF THAT THE DEFENDANT KNEW THAT THE FIRE WAS INTENTIONALLY SET TO FRAUDULENTLY OBTAIN INSURANCE PROCEEDS, IN CONTRAVENTION OF SUPREME COURT PRECEDENT.

The Eighth Circuit's application of 18 U.S.C. § 844 (h), that a defendant "uses" fire to commit another felony, conflicts with this Court's definition of "use" in *Bailey v. United States*, 516 US 137 (1995). The Eighth Circuit found that Ihmoud's participation in a meeting where the fires were planned, along with the insurance claim, were sufficient to show that Ihmoud "used" the fire to commit the mail fraud. (App. 27) The Eighth Circuit's application of "use" means that participation and agreement in a plan to commit arson are enough to "use" a fire, without the defendant's active employment of the fire. The Eighth Circuit interpreted this argument to imply that the defendant had to set the fire himself to "use" it. (App. 27) The definition of "use" is the active employment of the fire during the commission of the underlying felony, in this case, mail fraud. Under the Eighth Circuit's erroneous interpretation, the defendant (and others similarly situated) are subject to twenty years of consecutive imprisonment without proof that they actively employed the second fire to commit a felony. This is a result of the district court's interpretation of the "stacking" provisions of § 844 (h), finding that a twenty year consecutive sentence results from a "second or subsequent conviction" of another § 844 (h) offense. A jury convicted Mr. Ihmoud of arson in furtherance of mail fraud for the fire and subsequent

insurance claim made as a result of the July 10, 2003 fire at the St. Louis Supermarket on Broadway. The Government charged Mr. Ihmoud with this offense, a violation of 18 U.S.C. § 844 (h)(1) in Count XVII of the indictment. (App. 51)

One court has held that a defendant "uses" fire "to commit" a felony when it is one of the "means" by which a defendant attempts "to create the appearance of a legitimate loss of insured items" in order to accomplish the mail fraud. 18 U.S.C. § 844 (h)(i); *United States v. Ruiz*, 105 F. 3d 1492, 1504 (1st Cir. 1997). The *Ruiz* Court relied on the analysis of "uses" set out in *Bailey v. United States*, 516 U.S. 137 144, 16 S.Ct. 501 (1995) . Mr. Ihmoud submits that this means that the Government must prove that Mr. Ihmoud actively employed fire to accomplish the mail fraud. The elements "uses" and "to commit" mean active employment during the commission of the offense. The *Bailey* court reasoned that "uses" is variously defined as "to convert to one's service," "to employ," "to avail oneself of" and "to carry out a purpose or action by means of." *Bailey*, 516 U.S. at 144, citing *Smith v. United States*, 508 U.S. 223, 228-229, 113 S.Ct. 2050 (1993). The definitions *Bailey* held, "imply action and implementation." (Id.) *Bailey* also counseled that a reviewing court must consider a words placement and purpose, that is, its context. (Id.)

Although *Bailey* was about the definition of "uses" in relation to 18 U.S.C. § 924(c), the *Bailey* Court looked at the historical versions of § 924(c) which, it turns out, used very similar language to the § 844(h) language at issue here. The 1968 § 924(c) statute enhanced a defendant's sentence when she "uses a firearm to commit any felony which may be prosecuted in a court of the United States. . ." *Bailey*, 516 U.S. at 147. The *Bailey* court interpreted the phrase "uses . . . . to commit" as indicating "that Congress originally intended to reach the situation

where the firearm was actively employed during commission of the crime." *Bailey*, 516 U.S. at 147. The same meaning applies to "uses" fire "to commit" any felony, i.e., the fire must be actively employed during the commission of the mail fraud. Obviously mail fraud is an on going offense. But if "uses" means active employment of the fire, and Congress meant to punish its use in relation to insurance fraud precisely because fire is a danger when used to commit another offense, then there must be some evidence that the defendant knew, at the time of the fire, that he was "using" it "to commit" the fraud. In *Jones v. United States*, 529 U.S. 848 (2000), this Court looked to *Bailey's* interpretation of the word "use" in the context of 18 USC § 844 (i), finding that an owner occupied home is not "used" interstate commerce. Thus, the arson of such a building is not a federal crime. The *Jones* Court employed *Bailey's* analysis to define "used" "to mean active employment for commercial purposes, and not merely passive, passing or past connection to commerce." *Bailey*, 529 U.S. at 855.

The evidence that Mr. Ihmoud "used" fire "to commit" mail fraud in relation to the July 10, 2003 fire was insufficient to convict. The Government did not provide sufficient evidence for a reasonable jury to conclude that Mr. Ihmoud knew, on July 10, 2003, that an intentionally set fire was the means to commit the fraud on the insurance company. It certainly did not prove that Mr. Ihmoud carried out the arson. The St. Louis Supermarket video surveillance evidence offered by the Government lead to the conclusion that Charles D'Ary may have lit the fire just before closing on July 10, 2003, as he was crouching in the back of the store for ten minutes.

Eldgre Huddleston testified that Chuck D'Ary admitted to him that he burned the Broadway store on July 10, 2003. Eldgre did not testifying to any statement by Chuck

implicating Mr. Ihmoud in that fire. James Huddleston also claimed that Chuck told him that he started the fire, but never testified that Chuck implicated Mr. Ihmoud. The Eighth Circuit relied on James' testimony that Mr. Ihmoud was at a meeting where they discussed burning the stores. James never testified that Ihmoud discussed burning any particular store. There was also little evidence that Mr. Ihmoud had a financial motive to use the fire to commit mail fraud. The tax documents show that, in 2003, Mr. Ihmoud made money. As to the insurance claim for the fire, Mr. Ihmoud signed the proof of loss statement for the July 10, 2003 fire, making a claim of $250,000.00. But that claim was made in December of 2003, and does not prove what Mr. Ihmoud knew on July 10, 2003, that the fire was to be "used" to commit insurance fraud.

III. CERTIORARI IS WARRANTED TO CLARIFY THAT A § 844 (h) JURYINSTRUCTION MUST SPECIFY THE PREDICATE FELONY TO AVOID THE POSSIBILITY THAT A DEFENDANT IS CONVICTED BASED ON AN IMPERMISSIBLE FELONY, PARTICULARLY WHERE THE DEFENDANT IS CHARGED WITH AN IMPERMISSIBLE PREDICATE FELONY.

The instruction for arson in furtherance of mail fraud § 844 (h), instructed the jury that it could find the defendant guilty of that offense if it found that he used fire to commit "any felony." It did not specifically limit the underlying felony to mail fraud. Both arson and conspiracy to commit arson, the other two charges against the defendant, cannot serve as the underlying felony. The Eighth Circuit held that the instructions, taken as a whole, adequately informed the jury that the underlying felony was mail fraud, since the title of the instruction was "arson in furtherance of mail fraud." (App. 31)

The language "any felony" without qualification in the instruction, would lead the jury to believe that it could find guilt on the § 844(h) counts based on either the conspiracy or the arson charges. Instruction No. 32, given at trial without objection of trial counsel for Mr. Ihmoud, stated:

> The crime of arson in furtherance of mail fraud as charged in count XV, XVI and XVII of the indictment, has two essential elements, which are: One, the defendant used fire; two, the fire was used to commit a felony that can be prosecuted in a Federal Court.

(App. 53) The jury was also provided with a copy of the indictment, charging Mr. Ihmoud, in count XV, arson in furtherance of mail fraud for the August 20, 2002 fire, and Count XVII, charging Mr. Ihmoud with the same offense arising out of the July 10, 2003 fire. Of course, Mr. Ihmoud was also charged with the federal offenses of arson and conspiracy to commit arson. The verdict form for counts XV asked for a finding of guilty or not guilty for "arson in furtherance of mail fraud as charged in count XV of the indictment." The verdict form was the same for count XVII, referencing that count.

Neither conspiracy to commit arson nor arson can be the "any felony" under § 844 (h) because Congress did not intend "the use of fire to enhance the punishment for using fire." *United States v. Konopka*, 409 F.3d 837, 839 (7th Cir. 2005), citing *United States v. Gardner*, 211 F.3d 1049, 1056-57 (7th Cir. 2000); *United States v. Patel*, 370 F.3d 108, 115 n.5 (1st Cir. 2004); *United States v. Corona*, 108 F.3d 565, 571 (5th Cir. 1997); *United States v. Karlic*, 997 F.2d 564, 571 (9th Cir. 1993); see also *United States v. Chaney*, 559 F.2d 1094, 1096 (7th Cir. 1977).

The instruction was clearly given in error. The term "any felony" obviously encompasses impermissible, charged felonies. Its use undermines confidence in the trial pro-

ceedings. The instruction was in direct contradiction to the indictment, which was also supplied to the jury. It is further contradicted by the verdict form, which requests a finding of guilty or not guilty based on "arson in furtherance of mail fraud" as charged in the indictment. It cannot be said with confidence that the jury did not utilize the arson or conspiracy charge as the "any felony," as the erroneous instruction stated that they could.

CONCLUSION

This Court should grant the defendant's certiorari petition on the above issues.

Respectfully Submitted,

ROBERT A. NOVELLE, SR.
Counsel for Petitioner
Counsel of Record

TIMOTHY R. ROELLIG
On the Papers

SERPICO, NOVELLE, PETROSINO & RASCIA, LTD.
61 W. Superior Street
Chicago, Illinois 60610
(312) 787-1600

APPENDIX

AO 245B (Rev. 12/03)

Sheet 1- Judgment in a Criminal Case

United States District Court
Eastern District of Missouri

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: S1-4:04CR442 SNL

USM Number: 31186-044

Larry D. Hale

Defendant's Attorney

UNITED STATES OF AMERICA

v.

WALID IHMOUD
a/k/a WALLY

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s)
which was accepted by the court,

X was found guilty on count(s) one through five, seven, eight, fifteen, and seventeen on (sic) May 3, 2005 after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 371	Conspiracy to Commit Arson	08/12/2004	1
18 USC 844(i)	Arson	8/12/2004	2,4,7
18 USC 1341	Mail Fraud	8/12/2004	3,5,8

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ dismissed on the motion of the United States

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 28, 2005

Date of Imposition of Judgment

Signature of Judge

STEPHEN N. LIMBAUGH

SENIOR UNITED STATES DISTRICT JUDGE

Name & Title of Judge

July 28, 2005

Date signed

Judgment-Page 2 of 8

WALID IHMOUD

DEFENDANT: a/k/a WALLY

CASE NUMBER: S1-4:04CR442 SNL

District: Eastern District of Missouri

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 844(h)(1)	Arson in Furtherance of Mail Fraud	08/12/2004	15
18 USC 844 (h)(1)	Arson in Furtherance of Mail Fraud	08/12/2004	17

Judgment – Page 3 of 8

DEFENDANT: a/k/a WALLY

CASE NUMBER: S1-4:04CR442 SNL

District: Eastern District of Missouri

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 457 MONTHS

This term consists of 60 months on count one, and 97 months on each of counts two through five, seven and eight to be served concurrently, plus a term of 120 months on count fifteen to be served consecutively to counts one through five and counts seven and eight, and 240 months on count seventeen to be served consecutively to counts one through five, seven, eight, and fifteen.

☐ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at a.m./p.m.(sic) on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal

☐ as notified by the Probation or Pretrial Services Office

MARSHALS RETURN MADE ON SEPARATE PAGE

AO 245B (Rev. 12/03) Judgment in Criminal Case
Sheet 3 - Supervised Release

WALID IHMOUD

Judgment-Page 4 of 8

DEFENDANT: a/k/a WALLY

CASE NUMBER: S1-4:04CR442 SNL

District: Eastern District of Missouri

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 YEARS

This term consists of three years on counts one through five, seven, eight, fifteen and seventeen, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

X The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The Defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment

The defendant shall comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or paraphernalia related to any controlled substances, except as prescribed by a physician:

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer with in seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make

such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245B (Rev. 12/03) Judgment in Criminal Case Sheet 3A - Supervised Release

WALID IHMOUD

DEFENDANT: a/k/a WALLY

CASE NUMBER: S1-4:04CR442 SNL

District: Eastern District of Missouri

Judgment-Page 5 of 8

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall provide the United States Probation Office access to any requested financial information.

2. The defendant shall be prohibited from incurring new credit charges or opening additional lines of credit without approval of the United States Probation Office so long as there is a balance on the Court-imposed financial obligation.

3. The defendant shall pay the restitution as previously ordered by the Court.

AO 245B (Rev. 12/03) Judgment in Criminal Case
Sheet 5 - Criminal Monetary Penalties

Judgment – Page 6 of 8

WALID IHMOUD

DEFENDANT: a/k/a WALLY

CASE NUMBER: S1-4:04CR442 SNL

District: Eastern District of Missouri

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on sheet 6

	Assessment	Fine	Restitution
Totals	900,000	_____	$1,020,010.00

☐ The determination of restitution is deferred until ___. *An Amended Judgment in a Criminal Case* (AO 245C) will be entered after such a determination.

☐ The defendant shall make restitution, payable through the Clerk of Court, to the following payees in the amounts listed below. If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant to (sic) 18 U .S.C. 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Essex Insurance Company,			

4521 Highwoods Parkway,
Glen (sic) Allen VA 23060-6148 $300,010.00

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Bert Schonlau, 5933 Jackson Ave., St. Louis, MO 63134		$75,000.00	
Ohio Casualty Insurance Co., 9450 Seward Road, Fairfield, OH 45014		$645,000.00	
Totals:		$1,020,010.00	

☐ Restitution amount ordered pursuant to plea agreement

☐ The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived for the.

☐ fine and/or ☐ restitution. ☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:

• Findings for the total amount of losses are required under Chapters 109A, 110, 11 OA, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

AO 245B (Rev. 12/03) Judgment in Criminal Case
Sheet 5A - Criminal Monetary Penalties

WALID IHMOUD

Judgment – Page 7 of 8

DEFENDANT: a/k/a WALLY

CASE NUMBER: S1-4:04CR442 SNL

District: Eastern District of Missouri

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

IT IS FURTHER ORDERED that pursuant to the Mandatory Victims Restitution Act of 1996, the defendant shall make restitution in the total amount of $1,020,010.00. The victims of the instant offense are: (1) Essex Insurance Company, 4521 Highwoods Parkway(sic), Glen Allen, VA 23060-6148 that lost $300,010.00; (2) Bert Schonlau who lost $75,000.00; and (3) the Ohio Casualty Insurance Company that lost $645,000.00. Should future additional defendants be determined to be responsible for the same loss(es), this obligation shall be joint and several, meaning that no further payments shall be required after the sum of the amounts actually paid by all defendants has fully covered the compensable injuries. Payments of restitution shall be made to the Clerk of the Court for transfer to the victims. Restitution is due immediately, but if the defendant is unable to pay the restitution in full immediately, then restitution shall be paid in monthly installments of at least $500.00, with payments to commence no later than 30 days after release from imprisonment. The defendant shall notify the United States Attorney for this district within 30 days of any change of mailing or residence

address that occurs while any portion of the restitution remains unpaid. It is recommended that the defendant participate in the Financial Responsibility Program while incarcerated, if that is consistent with Bureau of Prisons policies.

AO 245B (Rev. 12/03) Judgment in Criminal Case Sheet 6 - Schedule of Payments

Judgment – Page 8 of 8

WALID IHMOUD

DEFENDANT: a/k/a WALLY

CASE NUMBER: S1-4:04CR442 SNL

District: Eastern District of Missouri

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A X Lump sum payment of $900.00 due immediately, balance due

☐ not later than_____ , or

X in accordance with ☐ C, ☐ D, or ☐ E, below; or X F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ E below; or ☐ F below; or

C ☐ Payment in_____(e.g., equal, weekly, monthly, quarterly) installments of_____ over a

period of_____ e.g., months or years), to commence

_____ (e.g., 30 or 60 days) after the

date of this judgment; or

D ☐ Payment in_____ (e.g., equal, weekly, monthly, quarterly) installments of_____ over a

period of____ e.g., months or years), to commence

_____ (e.g., 30 or 60 days) after

release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within____ (e.g., 30 or 60

days) after Release from imprisonment. The court will set the payment plan based on an

assessment of the defendant's ability to pay at that time: or

F X Special instructions regarding the payment of criminal monetary penalties:

Restitution is due immediately, but if the defendant is unable to pay the restitution in full immediately, then restitution shall be paid in monthly installments of at least $500.00, with payments to commence no later than 30 days after release from imprisonment.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are made to the clerk of the court.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

X Joint and Several

Defendant and Co-defendant Names and Case Numbers (including defendant number), Total

Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Zeyad Abdeljabbar, 4:04CR442 SNL (1), Walid Ihmoud, 4:04CR442 SNL (2), Charles D'Ary, 4:04CR442 SNL (3); This obligation shall be joint and several, meaning that no further payments shall be required after the sum of the amounts actually paid by all defendants has fully covered the total amount of restitution.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment; (2) restitution principal, (3) restitution interest, (4) fine principal, (5)fine interest (6) community restitution.(7) penalties, and (8) costs, including cost of prosecution and court costs.

WALID IHMOUD

DEFENDANT: a/k/a WALLY

CASE NUMBER: S1-4:04CR442 SNL

USM Number: 31186-044

UNITED STATES MARSHAL

RETURN OF JUDGMENT IN A CRIMINAL CASE

I have executed this judgment as follows:

_____

_____

The Defendant was delivered on _____
to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

Deputy U.S. Marshal

☐ The Defendant was released on _____to _____
Probation

☐ The Defendant was released on _____ to _____
Supervised Release

☐ and a Fine of _____ ☐ and Restitution in the amount of _____

_____

UNITED STATES MARSHAL

By

_____

Deputy U.S. Marshal

I certify and Return that on _____ I took custody of _____ at _____ and delivered same to _____ on F.F.T.

U.S. MARSHAL E/MO

By DUSM _____

United States Court of Appeals FOR THE EIGHTH CIRCUIT

No. 05-3178		
United States of America,	)	
	)	
Appellee,	)	
	)	
v.	)	Appeals from the United
	)	States District for the
Walid Ihmoud,	)	Eastern District of
	)	Missouri
Appellant.	)	
No. 05-3185		
United States of America,	)	
Appellee,	)	
v.	)	
Mohammad Almassri,	)	
Appellant.	)	
No. 05-3270		
United States of America,	)	
Appellee,	)	
v.	)	
Charles D'Ary,	)	
Appellant.	)	
No. 05-3522		
United States of America,	)	
Appellee,	)	
v.	)	
Zeyad Abdeljabbar,	)	
Appellant.	)	

Submitted: May 18, 2006
Filed: July 21, 2006

Before MURPHY, BEAM, and BENTON, Circuit Judges.

BENTON, Circuit Judge.

After a jury trial in district court,[1] Walid A. Ihmoud, Mohammad Almassri, Charles D'Ary, and Zeyad A. Abdeljabbar were convicted of numerous charges related to a series of building fires. They appeal. *See* **28 *U.S.C.* § 1291; 18 *U.S.C* § 3742.** This court affirms.

I.

Abdeljabbar owned a strip mall in St. Louis, Missouri. He also co-owned a grocery store, Sterling's Marketplace, in the strip mall. In February 2000, a fire damaged the store. Abdeljabbar received $123,250 in insurance proceeds. Abdeljabbar then dissolved his partnership with the co-owner, and sold the property to a third party.

In August 2002, a fire damaged Quality Bargains, a store operated by Ihmoud and located at Abdeljabbar's strip mall. Ihmoud received $300,010 in insurance proceeds.

By October 2002, Abdeljabbar had opened three grocery stores under the name of St. Louis Supermarkets. Ihmoud and Abdeljabbar went into business together, opening a fourth St. Louis Supermarket where the Sterling's Market-

---

[1] The Honorable Stephen N. Limbaugh, Sr., United States District Judge for the Eastern District of Missouri.

place had been (the "Broadway store"). There, they sold merchandise from Quality Bargains.

James Huddleston, an employee at the Broadway store, testified that Ihmoud asked him in January 2003 to burn the car of a jewelry-store owner whom Ihmoud suspected of vandalizing his car. James, with his brother William, poured gasoline on the vehicle but could not ignite it. Nevertheless, Ihmoud paid James $250 for the effort.

Jame's other brother, Eldgre, also worked for St. Louis Supermarkets. Eldgre testified that Abdeljabbar approached him in the spring of 2003 about burning the four St. Louis Supermarkets in exchange for about $31,000. Eldgre agreed, and recruited his nephew to help.

James testified that, in May 2003, Abdeljabbar asked him to come to a meeting. The meeting was attended by all four appellants-Abdeljabbar, D'Ary, Almassri, and Ihmoud. Abdeljabbar said that he wanted the four St. Louis Supermarkets to be burned, because they were losing money. Abdeljabbar wanted them burned at the same time, but before July 4. According to James, D'Ary suggested they be burned by the same method as the Quality Bargains fire. James was supposed to help D'Ary and Almassri burn the Broadway store. In exchange, James would be paid $3,000 to $5,000.

A few days later, Abdeljabbar told James to contact Ihmoud if he needed to know how to burn the Broadway store. Later, D'Ary informed James that he was going to use a white candle with a long wick to burn the Broadway store, because that is how he burned Quality Bargains.

On June 8, D'Ary set fire to the Broadway store, but firefighters responded and damage was minimal. Ihmoud instructed D'Ary, Almassri, and James to take merchandise off the shelves and break it near the location of the fire, to

"increase his insurance money." Abdeljabbar and Ihmoud ultimately made a $1,205,000 insurance claim.

Later that month, Abdeljabbar asked James to burn Abdeljabbar's car. James, with his brother William, doused the car with gasoline and burned it. Abdeljabbar paid James $250, later collecting $21,000 in insurance payments.

On July 2, Eldgre and his nephew met Almassri at the Broadway store in order to burn it. They carried gasoline jugs to the roof. Almassri and Eldgre's nephew then began chopping holes in the roof. However, the three left the store without starting the fire, leaving the jugs there. According to Eldgre, they agreed to return later that night to start the fire, but they did not follow through.

The next day a maintenance worker discovered the jugs and the holes. His supervisor insisted that the police be called. The police arrived and opened an investigation.

On July 10, D'Ary again set fire to the Broadway store. Investigators seized videos from the store's surveillance system. James testified that D'Ary later told him that he started the fire in a location he thought would burn quickly. Ihmoud made a $250,000 insurance claim.

Jose Rodriguez, an employee of St. Louis Supermarkets, testified that in July, Abdeljabbar asked him to burn the South Grand store in exchange for $10,000. Abdeljabbar told Rodriguez he wanted the store burned to collect insurance money. Rodriguez, with a friend, went to the store on July 20. As they approached it, they changed their minds and went home.

The other two St. Louis Supermarkets burned that night. Investigators seized surveillance tapes from each store. Abdeljabbar filed insurance claims for each of these fires.

Eldgre was arrested after a police officer recognized him from the surveillance video from the July 3 burning of the

Broadway store. He agreed to cooperate by wearing a recording device. On July 23, 2003, he met with Abdeljabbar, recording his statement that he would cut his throat if he said anything to anyone.

After a trial, the jury found all four defendants guilty of conspiracy to commit arson; Ihmoud and Abdeljabbar of mail fraud, arson, and arson in furtherance of mail fraud; D'Ary of arson; and Abdeljabbar and Almassri of attempted arson.

II.

A.

Ihmoud argues there is insufficient evidence to convict him of arson in furtherance of mail fraud under 18 U.S.C. § 844(h)(1), which punishes anyone who "uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States."

Evaluating sufficiency, this court views the evidence most favorably to the Government, including all reasonable inferences from the evidence. See ***United States v. Drews***, 877 F .2d 10, 13 (8th Cir. 1989). This court reverses "only if the jury must have had a reasonable doubt about an essential element of the crime." ***United States v. McDougal***, 137 F.3d 547, 553 (8th Cir. 1998).

Ihmoud first contends that the evidence does not show that he "knew, on July 10, 2003, that an intentionally set fire was the means to commit the fraud on the insurance company." The record refutes this contention. James Huddleston testified that Ihmoud attended the May 2003 meeting where Abdeljabbar said he wanted all four stores burned because they were losing money. Later, Abdeljabbar told James that, if he needed to know anything about how to burn the Broadway store, he could contact Ihmoud.

Because the fire was only partly successful, Ihmoud instructed D'Ary, Almassri, and James to take merchandise off the shelves and break it to "increase his insurance money." Abdeljabbar and Ihmoud then made a $1,205,000 insurance claim. The evidence supports the jury's finding that Ihmoud knew that the purpose of the arson was to defraud the insurance company.

Ihmoud also argues that there is insufficient evidence that he "used" fire within the meaning of the statute. Citing no authority, Ihmoud strongly implies that one "uses" fire only when one personally starts the fire.

This court has not interpreted the meaning of the word "uses" in the statute. However, relying on dictionary definitions, the Supreme Court concluded that the same term in another statute is "variously defined as '[t]o convert to one's service,' 'to employ,' 'to avail oneself of,' and 'to carry out a purpose or action by means of.'" ***Bailey v. United States***, 516 U.S. 137, 145 (1995), quoting ***Smith v. United States***, 508 U.S. 223, 228-29 (1993) (citations and internal quotation marks omitted). Under the plain meaning of the word, therefore, one can "use" fire without actually starting it. See ***United States v. Ruiz***, 105 F.3d 1492, 1501, 1503-04 (1st Cir. 1997) (finding that two defendants "used" fire under 18 U.S.C. § 844(h)(1), although one of them merely "assisted [the other defendant] . . . by providing access to the store and by failing to engage the alarm."). Ihmoud's participation in the May meeting, combined with his insurance claim, is sufficient to show that he "used" fire to carry out fraud.

B.

Ihmoud argues that the district court erred in admitting evidence that he hired James to burn the jewelry-store-owner's car. Ihmoud asserts that "there was no evidence

that the Ihmoud car fire was part of a common scheme or plan related to or having any nexus to the charged offenses."

The district court has broad discretion to admit evidence of other crimes. ***United States v. Thomas***, 398 F.3d 1058, 1062 (8th Cir. 2005), citing ***United States v. Mays***, 822 F.2d 793, 797 (8th Cir. 1987). This court reviews the district court's ruling for abuse of discretion and will "reverse only when such evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts." ***United States v. Howard***, 235 F.3d 366, 372 (8th Cir. 2000), quoting ***United States v. Brown***, 148 F.3d 1003, 1009 (8th Cir. 1998).

Under Rule 404(b), evidence of a prior crime, though inadmissible to show that a person acted in conformity with the prior act, may be admissible for other purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." **Fed. R. Evid. 404(b)**; see also ***United States v. Burke***, 425 F.3d 400,409 (8th Cir. 2005) ("While evidence of a defendant's prior bad conduct may not be admitted for purposes of showing action in conformity therewith, it may be used to show motive or a common scheme or plan."). Such evidence is admissible if it is (1) relevant to a material issue; (2) similar in kind and close in time to the crime charged; (3) proved by a preponderance of the evidence; and (4) if the potential prejudice does not substantially outweigh its probative value. ***United States v. Carroll***, 207 F.3d 465,469 n.2 (8th Cir. 2000); see also ***United States v. Jackson***, 278 F.3d 769, 771 (8th Cir. 2002).

The evidence, established by a preponderance, is relevant to material issues and similar to the crimes charged. In particular, the car fire is similar to the June burning of Abdeljabbar's car. Both car fires were carried out by James and William Huddleston, who used similar techniques. The fires were also close in time. The first occurred on January

16-just five months before Abdeljabbar's car was burned. Although "[t]here is no absolute rule for the number of years that can separate evidence of offenses admitted under Rule 404(b), II this court has approved the admission of other crimes evidence for acts committed up to 13 years before the crime charged. ***Thomas***, 398 F.3d at 1063. Finally, Ihmoud paid James $250 for his efforts-the same amount Abdeljabbar paid him. Thus, the evidence is highly probative to showing a conspiracy between Abdeljabbar and Ihmoud, who chose the same people to carry out similar criminal acts for the same pay.

Ihmoud argues that the district court erred in admitting evidence of the 2000 fire at the Broadway location. At the time of that fire, the Broadway store was owned by Abdeljabbar and a third party; Ihmoud had no interest in the property and no business dealings with Abdeljabbar. Ihmoud concludes that the evidence is irrelevant and prejudicial.

This court disagrees. Although Ihmoud was not involved in the 2000 fire, a coconspirator, Abdeljabbar, was. Evidence of pre-conspiracy conduct carried out by someone other than the defendant is admissible to show lithe establishment and structure of the conspiracy." ***United States v. Garrison***, 168 F.3d 1089, 1094 (8th Cir. 1999), citing *United States v.* ***Rodrequez***, 859 F.2d 1321 (8th Cir. 1988). The evidence shows how Abdeljabbar established a scheme to burn buildings for insurance proceeds. Because Abdeljabbar collected insurance proceeds from the 2000 fire, the jury could infer that this success motivated Ihmoud to join the conspiracy three years later.

Any prejudice from the evidence of the 2000 fire was limited by the court's instruction to the jury that they "may not use this similar acts evidence to decide whether a defendant carried out the acts involved in the crime charged in the indictment" and that, to find the defendant guilty,

they "must first unanimously find beyond a reasonable doubt based on the rest of the evidence that will be introduced in this case that a defendant carried out the acts involved in the crime charged in the indictment." See ***United States v. Thomas***, 398 F.3d 1058, 1063 (8th Cir. 2005) ("[T]he use of a limiting instruction decreases the danger that unfair prejudice will result from admission of the evidence.") (citation omitted).

Because Ihmoud has not shown that the 404(b) evidence" clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts," this court concludes that the district court did not abuse its discretion in admitting it. See ***Howard***, 235 F.3d at 372, quoting ***Brown***, 148 F.3d at 1009.[2]

C.

The court gave two instructions about arson in furtherance of mail fraud.

Instruction 31 says:

> Counts XV, XVI and XVII of the indictment are based upon a statute which is Federal law, Title 18, United States Code, Section 844(h)(1), which reads, in pertinent part, as follows:

---

[2] Even if there were error, it was harmless. Ihmoud's conviction is well supported by the evidence at trial, particularly his attendance at the May meeting and his instructions to take merchandise off the shelves and break to increase his insurance money. See ***United States v. Mack***, 343 F.3d 929, 935 (8th Cir. 2003) (finding that admission of prior bad acts evidence was harmless).

> Whoever uses fire . . . to commit any felony which may be prosecuted in a court of the United States [has committed a violation of Federal law.]

Instruction 32 says:

> The crime of Arson in Furtherance of Mail Fraud as charged in Counts XV, XVI and XVII of the indictment, has two essential elements, which are:
>
> One, the defendant used fire;
>
> Two, the fire was used to commit a felony that can be prosecuted in a Federal Court.

Abdeljabbar argues that Instruction 32 erroneously permits a jury to conclude that the arson itself can qualify as the "felony." For the same reason, Ihmoud objects to the phrase "any felony" in Instruction 31. Both appellants contend that the district court should have specified that the alleged "felony" is mail fraud, not arson.

These objections were not raised in the district court. This court reviews for plain error, affirming if the instructions, "taken as a whole," "adequately advise the jury of the essential elements of the offenses charged and the burden of proof required of the government." ***United States v. Rice***, 449 F.3d 887,895 (8th Cir. 2006) (internal quotation marks and alterations omitted).

The instructions meet that standard. Any confusion from Instruction 31's phrase "any felony" is cleared up by Instruction 32. By specifically saying "The Crime of Arson in Furtherance of Mail Fraud," Instruction 32 clarifies that the "felony" at issue is mail fraud. Likewise, the verdict form asks the jury to decide whether the defendants are guilty of "ARSON IN FURTHERANCE OF MAIL FRAUD."

Abdeljabbar also argues that "the jury should have been instructed that 'to commit' was a separate element of arson in furtherance of a felony." Abdeljabbar asserts that Instruction 32 permits the jury to find guilt without a nexus between the arson and the felony.

The instruction does not amount to clear error. It asks the jury to decide whether "the fire was used to *commit* a felony." (emphasis added). That language requires considering whether there was a causal nexus. Taken as a whole, the instructions adequately advise the jury of the essential elements of the offenses charged and the burden of proof required of the government. See ***id.***

To the extent that there is ambiguity in the instructions, it is harmless. The evidence at trial overwhelmingly demonstrates that the purpose of the fire was to commit mail fraud by fraudulently collecting insurance payments. In particular, the discussion at the May meeting and the instructions about collecting insurance money independently support the convictions. See ***Mack***, 343 F.3d at 935.

D.

At trial, the Government examined a law enforcement officer who testified about surveillance videotape from the buildings. The officer had prepared a log with brief descriptions of various scenes in the video. Although most log entries are objective, some are subjective and speculative. One entry states: "Chuck [D'Ary] walking in storage room looking at roof (where to place holes?)" This speculates about what D'Ary was thinking at the time. Another entry says: "Eldger [Huddleston] and Mike [Almassri] go to car to get hatchet." This speculates about the purpose of the trip to the car. When the two defendants return to the scene, the entry states: "Eldger and Mike walking in back (Eldger with hatchet behind his". The hatchet is apparently not visible in

the video. Another entry says: "Mike [Almassri] sweeps nonchalantly toward backroom." This subjectively characterizes Almassri's movement.

The defendants objected to the introduction of the officer's characterizations, arguing that some were unfairly prejudicial. The Government responded that, although the officer would need to use the log while testifying, there was no need to show it to the jury. The court informed counsel that it would defer ruling on the objections until the testimony.

After the officer's testimony, the Government moved to admit the log "albeit not for publishing." The court admitted the log into evidence.

During jury deliberations, the parties discovered that the log had been sent back to the jury. The defendants moved for mistrial or curative instruction, but these motions were denied. D'Ary and Almassri now argue that they are entitled to a new trial.

Even if publishing the log to the jury were error, this court finds it harmless. The jury saw the videotape itself, including the scenes that were subjectively characterized. Any inaccuracies in the log's descriptions are exposed by viewing the tape. In addition, the jury's finding of D'Ary and Almassri's guilt is well-supported by other evidence. James Huddleston testified that both D'Ary and Almassri attended the May meeting, where D'Ary suggested that the fires be started the same way as the Quality Bargains fire. James also testified that D'Ary admitted setting fire to the Broadway store on June 8. Because that fire was unsuccessful, D'Ary and Almassri took merchandise off the shelves and broke it. Eldgre Huddleston testified that Almassri met him on July 2 to burn the Broadway store. Almassri carried gas jugs to the roof, and then chopped holes in it. According to James's testimony, after the original plan to burn the Broadway store was foiled, D'Ary returned and burned it on

July 10, 2003. Any error in publishing the log was harmless. See ***id.***

E.

According to Abdeljabbar, the district court erred in concluding that it was required to run consecutively his sentences for the multiple arson convictions. The district court relied on 18 U.S.C. § 844(h) (emphasis added):

> Whoever-
>
> (1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States,
>
> including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 20 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, *nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment* including that imposed for the felony in which the explosive was used or carried.

The district court rejected Abdeljabbar's argument that the phrase "any other term of imprisonment" implicitly excludes arson. By his argument, a defendant convicted of multiple counts of arson can be sentenced concurrently, while a

defendant who used fire to commit any crime except arson shall be sentenced consecutively.

This court has never addressed this argument in the context of § 844(h). This court has interpreted 18 U.S.C. § 924(c)(1), a firearms statute with nearly identical language. That statute, at the time this court interpreted it, stated: "nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried." ***Id.*** In ***United States v. Davis***, 103 F.3d 660,667 (8th Cir. 1996), the defendant was convicted of three robberies. This court rejected his argument that the district court erred in imposing consecutive sentences under § 924(c)(1). This court held that the "express language of the statute prohibits the district court from allowing the firearms terms of imprisonment to run concurrently with each other or with the underlying crime of violence." ***Id.***; see also ***United States v. Allee***, 299 F.3d 996, 1003-04 (8th Cir. 2002) (following *Davis*).

The express language of § 844(h) - just like § 924(c)(1) - categorically prohibits concurrent sentences for "any other term of imprisonment." The district court did not abuse its discretion in running Abdeljabbar's sentences consecutively.

F.

Ihmoud argues that his sentence for multiple counts violates the Double Jeopardy Clause. The Government responds that this court declines to review double jeopardy arguments not raised before the district court. See ***United States v. High Elk***, 442 F.3d 622, 624 (8th Cir. 2006); ***United States v. Santana***, 150 F.3d 860,86364 (8th Cir. 1998); ***United States v. Goodwin***, 72 F.3d 88,91 (8th Cir. 1995); ***United States v. Shephard***, 4 F.3d 647, 650 (8th

Cir. 1993); ***United States v. Garrett***, 961 F.2d 743, 748 (8th Cir. 1992); ***United States v. Herzog***, 644 F.2d 713, 716 (8th Cir. 1981); ***United States v. Conley***, 503 F.2d 520, 521 (8th Cir. 1974). However, this court has also reviewed such arguments for plain error, even if the defendant failed to raise the claim earlier. See ***United States v. Washburn***, 444 F.3d 1007, 1010 (8th Cir. 2006); ***United States v. Sickinger***, 179 F.3d 1091, 1092-93 (8th Cir. 1999); ***United States v. Jackson***, 155 F.3d 942,947 (8th Cir. 1998); ***United States v. Uder***, 98 F.3d 1039, 1045 (8th Cir. 1996).

This case does not require resolving any inconsistencies among these cases, because Ihmoud's argument fails even under plain error review. Under the plain error standard, the conviction is affirmed "unless (1) the district court made an error, (2) the error was plain under current law, meaning clear and obvious, and (3) the error was prejudicial and affected the trial outcome." ***Jackson***, 155 F.3d at 947, citing ***United States v. Olano***, 507 U.S. 725 (1993). "The court should only correct the error if the error results in a miscarriage of justice or seriously affects the fairness, integrity, or public reputation of the judicial proceedings." ***Id.***

In this case, the key to double jeopardy analysis is "whether Congress 'intended that each violation be a separate offense.'" ***United States v. Bennett***, 44 F.3d 1364, 1373 (8th Cir. 1995), quoting ***Garrett v. United States***, 471 U.S. 773, 778(1985). If Congress so intended, there is no double jeopardy violation.

This court has held that Congress intended 18 U.S.C. § 844(h) to allow prosecution for both the crime of using fire to commit a felony, and the felony itself. See ***United States v. Shriver***, 838 F .2d 980, 982 (8th Cir. 1988). Ihmoud's conviction for conspiracy does not change the analysis. "It is well settled that no double jeopardy violation occurs when a person is convicted of conspiracy and a substantive overt act of the conspiracy." ***United States v. Cerone***, 830 F.2d

938,944 (8th Cir. 1987). This court finds no plain error in Ihmoud's conviction and sentencing for arson, conspiracy to commit arson, and arson in furtherance of mail fraud.

III.

The judgments are affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
	)	No. S1-4:04CR00442 SNL
	)	
ZEYAD ABDELJABBAR, a/k/a "Steve,"	)	Counts I, IV-XIV, XVI, XVII
WALID IHMOUD, a/k/a "Wally,"	)	Counts I-V, VII, VIII, XV,
CHARLES D'ARY, a/k/a "Chuck,"	)	XVII
MOHAMMAD ALMASSRI, a/k/a	)	Counts I, II, IV, VII
"Mike,"and	)	Counts I, IX
SAID JARABAA, a/k/a "Sammy,"	)	Counts I, IX
	)	
	)	
Defendants.	)	

RELEVANT COUNTS OF THE INDICTMENT

COUNT I

(CONSPIRACY)

The Grand Jury charges that:

A. INTRODUCTION

1. At all times pertinent to this Indictment, St. Louis, Supermarkets, Inc., doing business as (d/b/a) St. Louis Supermarkets, was a Missouri corporation largely owned and operated by ZEYAD ABDELJABBAR, also known as (a/k/a) "Steve." St. Louis Supermarkets was a grocery store business whose initial and principal place of business was located at 2700 South Grand, St. Louis, Missouri. Incorporation occurred on March 20, 2000.

2. In April of 2001, ZEYAD ABDELJABBAR, a/k/a "Steve," opened another St. Louis Supermarkets, located at 8352 Frost, St. Louis County, Missouri. ZEYAD ABDELJABBAR,

a/k/a "Steve," was the primary owner and operator of this grocery store business.

3. On December 21, 2001, St. Louis Supermarket #3, Inc., d/b/a St. Louis Supermarkets, located at 4331 Natural Bridge, St. Louis, Missouri, and engaged in the grocery business, was incorporated with shared ownership between ZEYAD ABDELJABBAR, a/k/a "Steve," Naiel ABDELJABBAR, and Bassam HAMED, a/k/a "Sam." The building at 4331 Natural Bridge was owned by St. Louis Real Estate Investments, a corporation established by ZEYAD ABDELJABBAR, a/k/a "Steve."

4. WALID IHMOUD, a/k/a "Wally," was the owner and operator of Quality Bargains, Inc., d/b/a Quality Bargains, located at 8350 North Broadway, St. Louis, Missouri. Quality Bargains engaged in a general merchandise business and was incorporated in 1999.

5. On or about November 16, 2001, Quality Bargains Incorporated/WALID IHMOUD, a/k/a "Wally," obtained fire insurance from the Clark Insurance Agency, Inc., Chesterfield, Missouri, for Quality Bargains located at 8350 North Broadway, St. Louis, Missouri. This policy was underwritten by Essex Insurance Company, 4521 Highwoods Parkway, Glen Allen, Virginia 23060-6148, providing $300,000 protection on the contents of Quality Bargains.

6. On August 20, 2002, a fire occurred at Quality Bargains, 8350 North Broadway, St. Louis, Missouri, which originated on shelves containing area rugs. St. Louis Fire Department investigators determined that the fire was set intentionally. An insurance adjuster determined that the fire caused damage estimated at $312,500. Essex Insurance Company sent a check for $300,010 to Quality Bargains on October 9, 2002.

7. On October 17, 2002, St. Louis Supermarket #4, Inc., d/b/a St. Louis Supermarkets, located at 8350 North Broad-

way, St. Louis, Missouri, and engaged in the grocery business, was incorporated with shared ownership between ZEYAD ABDELJABBAR, a/k/a "Steve," Abdelhalleem Abdeljabbar, and WALID IHMOUD, a/k/a "Wally."

8. CHARLES D'ARY, a/k/a "Chuck," MOHAMMAD ALMASSRI, a/k/a "Mike," and SAID JARABAA, a/k/a "Sammy," were all employed by St. Louis Supermarkets.

9. On or about November 21, 2002, WALID IHMOUD, a/k/a "Wally," obtained fire insurance from S.A. Freerks and Associates, 911 Park Avenue, St. Louis, Missouri, through Clark Insurance Agency, Chesterfield, Missouri, for the St. Louis Supermarkets located at 8350 North Broadway, St. Louis, Missouri. This policy was underwritten by Investors Underwriting Managers, Inc., 310 Highway 35 South, Red Bank, New Jersey 07701-5921, providing $1,500,000 protection on the contents of St. Louis Supermarkets at 8350 North Broadway.

10. On June 8, 2003, a fire occurred at St. Louis Supermarkets, 8350 North Broadway, St. Louis, Missouri, which originated in rolls of fabric located in a storage room. St. Louis Fire Department investigators initially determined that the fire was unintentional. In a proof of loss submitted to Investors Underwriting Managers, WALID IHMOUD, a/k/a "Wally," claimed $1,205,000 loss as a result of the fire. An insurance adjuster determined that the fire caused damage estimated at $430,000. The claim is in dispute and not paid as of this date.

11. On June 30, 2003, a fire occurred in a 2000 Toyota 4-Runner owned by ZEYAD ABDELJABBAR, a/k/a "Steve," and parked in the parking lot of St. Louis Supermarkets, 2700 South Grand, St. Louis, Missouri, which originated in the vehicle's seats. St. Louis Fire Department investigators determined that the fire was intentionally set.

12. On July 3, 2003, thirteen separate man-made holes and ignitable liquids were discovered on the roof of St. Louis

Supermarkets, 8350 North Broadway, St. Louis, Missouri. St. Louis Fire Department investigators determined that the holes were prepared for the purpose of intentionally setting fire to the building.

13. On July 10, 2003, a fire occurred at St. Louis Supermarkets, 8350 North Broadway, St. Louis, Missouri, which originated in the store area containing curtains. St. Louis Fire Department investigators determined that the fire was intentionally set. In a proof of loss submitted to Investors Underwriting Managers, WALID IHMOUD, a/k/a "Wally," claimed $250,000 loss as a result of the fire. An insurance adjuster did not make a new estimate of the fire damage due to the previous estimate of damage made regarding the June 8, 2003, fire. The claim is in dispute and not paid as of this date.

14. On or about January 10, 2003, ZEYAD ABDELJABBAR, a/k/a "Steve," obtained fire insurance from the Midwest Agency, 910 Bent Oak Court, Lake St. Louis, Missouri, for the St. Louis Supermarkets located at 4331 Natural Bridge, St. Louis, Missouri. This policy was underwritten by State Auto Property and Casualty Insurance Company, 518 East Broad Street, Columbus, Ohio 43215, providing $500,000 protection on the contents of the St. Louis Supermarkets at 4331 Natural Bridge and loss of income.

15. On or about May 26, 2003, ZEYAD ABDELJABBAR, a/k/a "Steve," obtained fire insurance from Midwest Agency, 910 Bent Oak Court, Lake St. Louis, Missouri, for St. Louis Real Estate Investments located at 4301-4343 Natural Bridge, St. Louis, Missouri. This policy was underwritten by General Casualty, 13200 Metcalfe Avenue, Suite 400, Overland Park, Kansas 66213, providing $2,500,000 protection on the building at 4301-4343 Natural Bridge including the St. Louis Supermarkets at 4331 Natural Bridge.

16. On July 21, 2003, a fire occurred at St. Louis Supermarkets, 4331 Natural Bridge, St. Louis, Missouri, which

originated in multiple areas of the store. St. Louis Fire Department investigators determined that the fire was set intentionally. In a proof of loss submitted to State Auto Property and Casualty, Bassam HAMED, a/k/a "Sam," claimed $544,913 in contents and loss of income as a result of the fire. An insurance adjuster determined that the fire caused damage estimated at $631,500. On December 17, 2003, State Auto Property and Casualty sent a check to St. Louis Supermarkets for $50,000 as an advancement; the rest of the claim is in dispute and not paid as of this date. In a proof of loss submitted to General Casualty, ZEYAD ABDELJABBAR, a/k/a "Steve," claimed $756,099 loss to the building as a result of the fire. An insurance adjuster determined that the fire caused damage estimated at $761,099. The claim is in dispute and not paid as of this date.

17. On or about March 25, 2003, ZEYAD ABDELJABBAR, a/k/a "Steve," obtained fire insurance from the Midwest Agency, 910 Bent Oak Court, Lake St. Louis, for the contents of the St. Louis Supermarkets located at 8352 Frost, Berkeley, Missouri. This policy was underwritten by State Auto Property and Casualty Insurance Company, 518 East Broad Street, Columbus, Ohio 43215, providing $765,000 for building and $195,000 protection on the contents of St. Louis Supermarkets at 8352 Frost.

18. On July 21, 2003, a fire occurred at St. Louis Supermarkets, 8352 Frost, St. Louis County, Missouri, which originated in general merchandise in a rear storage room. Berkeley, Missouri, Fire Department investigators determined that the fire was set intentionally. In a proof of loss submitted to State Auto Property and Casualty, ZEYAD ABDELJABBAR, a/k/a "Steve," claimed $377,399 loss for contents and loss of income as a result of the fire. An insurance adjuster determined that the fire caused damage estimated at $346,500. On December 17, 2003, State Auto Property and Casualty sent a check to St. Louis Supermar-

kets for $50,000 as an advancement; the rest of the claim is in dispute and not paid as of this date.

B. THE CONSPIRACY

19. Beginning in or about August, 2002, and continuing until the present date, in the Eastern District of Missouri,

ZEYAD ABDELJABBAR, a/k/a "Steve,"
WALID IHMOUD, a/k/a "Wally,"
CHARLES D'ARY, a/k/a "Chuck,"
MOHAMMAD ALMASSRI, a/k/a "Mike," and
SAID JARABAA, a/k/a "Sammy,"

the defendants herein, did knowingly and willfully conspire, combine, confederate, and agree together and with other individuals, known and unknown to this Grand Jury, to maliciously damage and destroy, by means of fire, the buildings located at 2700 South Grand, 8350 North Broadway, 4331 Natural Bridge, all located in the City of St. Louis, Missouri, and 8352 Frost, located in St. Louis County, Missouri, all doing business as (d/b/a) St. Louis Supermarkets or Quality Bargains, all places of public use, and all of which buildings and personal properties located therein were used in an activity affecting interstate commerce, in violation of Title 18, United States Code, Section 844(i).

C. MANNER AND MEANS

20. The means and methods by which the conspiracy was sought to be accomplished included, among others, the following:

a. It was part of the conspiracy that ZEYAD ABDELJABBAR, a/k/a "Steve," and WALID IHMOUD, a/k/a "Wally," recruited people to set fire to St. Louis Supermarkets grocery stores.

b. It was part of the conspiracy that ZEYAD ABDELJABBAR, a/k/a "Steve," would pay CHARLES D'ARY, a/k/a "Chuck," MOHAMMAD ALMASSRI, a/k/a "Mike," and others to set fire to St. Louis Supermarkets grocery stores.

c. It was part of the conspiracy that ZEYAD ABDELJABBAR, a/k/a "Steve," and WALID IHMOUD, a/k/a "Wally," obtained insurance from fire on the buildings and contents of the St. Louis Supermarkets grocery stores.

d. It was part of the conspiracy for ZEYAD ABDELJABBAR, a/k/a "Steve," WALID IHMOUD, a/k/a "Wally," and Bassam HAMED, a/k/a "Sam," to file "Proof of Loss" forms with insurance companies requesting reimbursement for fire damage, each time falsely claiming that they were not responsible for the fire damage.

D. OVERT ACTS

21. In furtherance of the conspiracy and to effect the objects of the conspiracy, the conspirators committed and caused the following overt acts:

a. On or about August 20, 2002, CHARLES D'ARY, a/k/a "Chuck," set fire to 8350 North Broadway, St. Louis, Missouri, d/b/a Quality Bargains, at the request of WALID IHMOUD, a/k/a "Wally."

b. On or about August 21, 2002, WALID IHMOUD, a/k/a "Wally," mailed a property loss notice to Essex Insurance Company claiming that he did not cause the fire on August 20, 2002, at Quality Bargains, 8350 North Broadway, St. Louis, Missouri, by any act, design or procurement on his part.

c. On or about June 8, 2003, CHARLES D'ARY, a/k/a "Chuck," set fire to 8350 North Broadway, St. Louis, Missouri, d/b/a St. Louis Supermarkets, at the request of

ZEYAD ABDELJABBAR, a/k/a "Steve," and WALID IHMOUD, a/k/a "Wally."

d. On or about July 3, 2003, MOHAMMAD ALMASSRI, a/k/a "Mike," attempted to set fire to 8350 North Broadway, St. Louis, Missouri, d/b/a St. Louis Supermarkets, at the request of ZEYAD ABDELJABBAR, a/k/a "Steve."

e. On or about July 10, 2003, CHARLES D'ARY, a/k/a "Chuck," set fire to 8350 North Broadway, St. Louis, Missouri, d/b/a St. Louis Supermarkets, at the request of ZEYAD ABDELJABBAR, a/k/a "Steve," and WALID IHMOUD, a/k/a "Wally."

f. On or about July 21, 2003, SAID JARABAA, a/k/a "Sammy," helped and aided another individual unknown to this Grand Jury to set fire to 4331 Natural Bridge, St. Louis, Missouri.

g. On or about December 12, 2003, ZEYAD ABDELJABBAR, a/k/a "Steve," and WALID IHMOUD, a/k/a "Wally," mailed a proof of loss statement to Investors Underwriting Managers, Inc., claiming that they did not cause the fire on July 10, 2003, at St. Louis Supermarkets, 8350 North Broadway, St. Louis, Missouri, by any act, design or procurement on their part.

h. On or about April 19, 2004, ZEYAD ABDELJABBAR, a/k/a "Steve," mailed a proof of loss statement to Jim Stivers, General Adjuster and Representative of State Auto Property and Casualty Insurance Company, claiming that he did not cause the fire on July 21, 2003, at St. Louis Supermarkets, 4331 Natural Bridge, St. Louis, Missouri, by any act, design or procurement on his part.

i. On or about April 19, 2004, ZEYAD ABDELJABBAR, a/k/a "Steve," mailed a proof of loss statement to Jim Stivers, General Adjuster and Representative of State Auto

Property and Casualty Insurance Company, requesting reimbursement from State Auto for the loss occurring on July 21, 2003, at St. Louis Supermarkets, 8352 Frost, Berkeley County, Missouri.

j. On or about August 29, 2003, ZEYAD ABDELJABBAR, a/k/a "Steve," mailed a proof of loss statement to General Casualty, claiming that he did not cause the fire on July 21, 2003, at St. Louis Supermarkets, 4331 Natural Bridge, St. Louis, Missouri, by any act, design or procurement on his part.

All in violation of Title 18, United States Code, Section 371.

COUNT II

(ARSON)

The Grand Jury further charges that:

On or about August 20, 2002, in the Eastern District of Missouri,

WALID IHMOUD, a/k/a "Wally," and CHARLES D'ARY, a/k/a "Chuck,"

the defendants herein maliciously damaged and destroyed, by means of fire, the building located at 8350 North Broadway, St. Louis, Missouri, d/b/a Quality Bargains, a place of public use, which building and personal property contained therein were used in an activity affecting interstate commerce.

In violation of, and punishable under, Title 18, United States Code, Sections 844(i) and 2.

COUNT III

(MAIL FRAUD)

The Grand Jury further charges that:

INTRODUCTION

1. The allegations contained in Counts I and II of the Indictment are realleged and incorporated herein by reference as if fully set forth.

THE SCHEME

2. From in or about August of 2002 and continuing until the present date, in the Eastern District of Missouri,

WALID IHMOUD, a/k/a "Wally,"

the defendant herein, together with others known and unknown to the Grand Jury, did knowingly and willfully devise and intend to devise a scheme and artifice to defraud and to obtain more than $200,000 but less than $400,000 from Essex Insurance Company, by means of false and fraudulent pretenses and representations, well knowing that said pretenses and representations were false when made.

3. It was part of said scheme and artifice that Walid Ihmoud, a/k/a "Wally," would and did arrange for the August 20, 2002, burning of the Quality Bargains building located at 8350 North Broadway, St. Louis, Missouri, in order to obtain proceeds from the fire insurance policy underwritten by Essex Insurance Company.

4. It was further part of said scheme and artifice that Walid Ihmoud, a/k/a "Wally," representing Quality Bargains, did cause to be submitted false and fraudulent statements in a property loss notice to Essex Insurance Company and that these statements were false and fraudulent in that Walid Ihmoud, a/k/a "Wally," claimed that he did not cause the fire losses by any act, design or procurement on his part.

THE MAILING

5. On or about August 21, 2002, in the Eastern District of Missouri,

WALID IHMOUD, a/k/a "Wally,"

the defendant herein, in furtherance of and for the purpose of executing the aforementioned scheme and artifice to defraud and to obtain money and attempting to do so, used the Postal Service by mailing or causing to be mailed according to the directions therein, a property loss notice to Essex Insurance Company, claims department at P.O. Box 2010, Glen Allen, Virginia, reporting the fire loss which occurred on August 20, 2002, at 8350 North Broadway, St. Louis, Missouri.

In violation of, and punishable under, Title 18, United States Code, Sections 1341 and 2.

COUNT VII

(ARSON)

The Grand Jury further charges that:

On or about July 10, 2003, in the Eastern District of Missouri,

ZEYAD ABDELJABBAR, a/k/a "Steve,"
WALID IHMOUD, a/k/a "Wally," and
CHARLES D'ARY, a/k/a "Chuck,"

the defendants herein, maliciously damaged and destroyed, by means of fire, the building located at 8350 North Broadway, St. Louis, Missouri, d/b/a St. Louis Supermarkets, a place of public use, which building and personal property contained therein were used in an activity affecting interstate commerce.

In violation of, and punishable under, Title 18, United States Code, Sections 844(i) and 2.

COUNT VIII

(MAIL FRAUD)

The Grand Jury further charges that:

INTRODUCTION

1. The allegations contained in Counts I and VII of the Indictment are realleged and incorporated herein by reference as if fully set forth.

THE SCHEME

2. From in or about August of 2002 and continuing until the present date, in the Eastern District of Missouri,

ZEYAD ABDELJABBAR, a/k/a "Steve," and WALID IHMOUD, a/k/a "Wally,"

the defendants herein, together with others known and unknown to the Grand Jury, did knowingly and willfully devise and intend to devise a scheme and artifice to defraud and to obtain more than $200,000 but less than $400,000 from Investors Underwriting Managers, Inc., by means of false and fraudulent pretenses and representations, well knowing that said pretenses and representations were false when made.

3. It was part of said scheme and artifice that ZEYAD ABDELJABBAR, a/k/a "Steve," and WALID IHMOUD, a/k/a "Wally," would and did arrange for the July 10, 2003, burning of the St. Louis Supermarkets building located at 8350 North Broadway, St. Louis, Missouri, in order to obtain proceeds from the fire insurance policy underwritten by Investors Underwriting Managers, Inc.

4. It was further part of said scheme and artifice that WALID IHMOUD, a/k/a "Wally," representing St. Louis Supermarkets, did submit and cause to be submitted false and fraudulent statements in proofs of loss to Investors Underwriting Managers, Inc. and that these sworn state-

ments were false and fraudulent in that WALID IHMOUD, a/k/a "Wally," certified that he did not cause the fire losses by any act, design or procurement on his part.

THE MAILING

5. On or about December 12, 2003, in the Eastern District of Missouri,

ZEYAD ABDELJABBAR, a/k/a "Steve," and WALID IHMOUD, a/k/a "Wally,"

the defendants herein, in furtherance of and for the purpose of executing the aforementioned scheme and artifice to defraud and to obtain money and attempting to do so, used the Postal Service by mailing or causing to be mailed according to the directions therein, a sworn statement in proof of loss to Investors Underwriting Managers, Inc., claims department at 310 Highway 35 South, Red Bank, New Jersey 07701, requesting reimbursement of $250,000 for the fire loss which occurred on July 10, 2003, at 8350 North Broadway, St. Louis, Missouri.

In violation of, and punishable under, Title 18, United States Code, Sections 1341 and 2.

COUNT XV

(ARSON IN FURTHERANCE OF MAIL FRAUD)

The Grand Jury further charges that:

1. The allegations contained in Counts I, II and III of the Indictment are realleged and incorporated herein by reference as if fully set forth.

2. On or about August 20, 2002, in the Eastern District of Missouri,

WALID IHMOUD, a/k/a "Wally,"

the defendant herein, used, or caused to be used, fire to commit a felony which may be prosecuted in a court of the

United States, namely: Mail Fraud for the purpose of obtaining insurance proceeds from Essex Insurance Company, as a result of business personal property losses due to fire damage as charged in Count III of this Indictment.

In violation of Title 18, United States Code, Sections 844(h)(1) and 2.

COUNT XVII

(ARSON IN FURTHERANCE OF MAIL FRAUD)

The Grand Jury further charges that:

1. The allegations contained in Counts I, VII and VIII of the Indictment are realleged and incorporated herein by reference as if fully set forth.

2. On or about July 10, 2003, in the Eastern District of Missouri,

ZEYAD ABDELJABBAR, a/k/a "Steve," and WALID IHMOUD, a/k/a "Wally,"

the defendants herein, used, or caused to be used, fire to commit a felony which may be prosecuted in a court of the United States, namely: Mail Fraud for the purpose of obtaining insurance proceeds from Investors Underwriting Managers, Inc., as a result of business personal property losses due to fire damage as charged in Count VIII of this Indictment.

In violation of Title 18, United States Code, Sections 844(h)(1) and 2.

A TRUE BILL.

_____

FOREPERSON

JAMES G. MARTIN
United States Attorney

JOHN J. WARE, #11644
Assistant United States Attorney

INSTRUCTION NO. 32

The crime of Arson in Furtherance of Mail Fraud as charged in Counts XV, XVI and XVII of the indictment, has two essential elements, which are:

One, the defendant used fire;

Two, the fire was used to commit a felony that can be prosecuted in a Federal Court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
	) No. S1-4:04CR00442 SNL
	)
WALID IHMOUD,	)
	)
Defendant.	)

VERDICT

We, the jury in the above-entitled cause, on the trial of the defendant, WALID IHMOUD, charged in the indictment, find as follows:

COUNT I

We find the defendant, WALID IHMOUD,

Guilty

(guilty or not guilty)

of **CONSPIRACY** as charged in Count I of the Indictment.

COUNT II

We find the defendant, WALID IHMOUD,

Guilty

(guilty or not guilty)

of **ARSON** as charged in Count II of the Indictment.

COUNT III

We find the defendant, WALID IHMOUD,

Guilty

(guilty or not guilty)

of **MAIL FRAUD** as charged in Count III of the Indictment.

COUNT IV

We find the defendant, WALID IHMOUD,

Guilty

(guilty or not guilty)

of **ARSON** as charged in Count IV of the Indictment.

COUNT V

We find the defendant, WALID IHMOUD,

Guilty

(guilty or not guilty)

of **MAIL FRAUD** as charged in Count V of the Indictment.

COUNT VII

We find the defendant, WALID IHMOUD,

Guilty

(guilty or not guilty)

of **ARSON** as charged in Count VII of the Indictment.

COUNT VIII

We find the defendant, WALID IHMOUD,

Guilty

(guilty or not guilty)

of **MAIL FRAUD** as charged in Count VIII of the Indictment.

COUNT XV

We find the defendant, WALID IHMOUD,

Guilty

(guilty or not guilty)

of **ARSON IN FURTHERANCE OF MAIL FRAUD** as charged in Count XV of the Indictment.

COUNT XVII

We find the defendant, WALID IHMOUD,

Guilty

(guilty or not guilty)

of **ARSON IN FURTHERANCE OF MAIL FRAUD** as charged in Count XVII of the Indictment.

FOREPERSON _____

Dated this 3rd day of May, 2005.